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No. 01-620

IN THE
Supreme Court of the United States

BUILDING INDUSTRY ASSOCIATION OF SUPERIOR CALIFORNIA, ET. AL.,
Petitioners,

v.

GALE NORTON, ET. AL.,
Respondents,

ENVIRONMENTAL DEFENSE CENTER, ET. AL.,
Respondents.

On Petition for Writ of Certiorari to United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE CONSULTING ENGINEERS AND LAND SURVEYORS OF CALIFORNIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Consulting Engineers and Land Surveyors of California ("CELSOC") represents 1,100 member firms providing a wide variety of services for proposed public works and privately sponsored projects. Services provided by CELSOC's member firms include conducting environmental studies, preparing environmental impact reports, designing site plans for proposed projects, surveying proposed project sites, identifying available water sources, performing water quality analyses, designing drainage for project sites, and assisting project sponsors during the environmental review and permitting process. As environmental issues regarding projects and associated administrative processes are central to the daily operations of its members, CELSOC has an obvious interest in the scope of federal regulatory authority in general, and federal environmental regulation in particular.

Application of the federal Endangered Species Act ("ESA") in California with respect to entirely intrastate activities in violation of the Commerce Clause, burdens or blocks projects for which CELSOC's members provide or could provide services. Owing to the ESA's administration in this unconstitutional manner, CELSOC's members, and other similarly situated engineers and surveyors, have experienced unexpected and unwarranted terminations of

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[1] Pursuant to this Court's Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties have given written consent to the filing of this amicus brief in letters that have been submitted to the clerk of this Court. *See* Sup. Ct. R. 37.3(a).

projects, reductions in the scope of projects, and lengthy and expensive delays in project development and implementation.

Unconstitutional enforcement of the ESA in California also subjects engineering and surveying firms to overlapping and potentially conflicting federal, state, and local standards concerning the protection of entirely intrastate wildlife. The consequent uncertainty and confusion about how and when to satisfy the requirements of the ESA, the entirely independent California Endangered Species Act, and other state and local laws concerning wildlife, subjects engineering and surveying firms to added costs and liability exposure while working on projects. Because the statute challenged in this case restricts the opportunities for engineering and surveying firms to provide services on projects, and exposes such firms to financial harm, this Court's resolution of the issues presented would be of great significance to CELSOC, its members, and other similarly situated engineering and surveying firms.

Summary Of Argument

The listing of endangered and threatened species is of critical importance to those who use or develop property, or hope to, and those (such as CELSOC's members) who assist in the use and development of property. Once listed, a species automatically receives various forms of protection under the ESA, some of which may severely constrain activities and projects on private as well as public land. Roughly half of the species listed by the Service as endangered or threatened are found entirely within a single state, as are the fairy shrimp at issue here.

This Court has never upheld a Commerce Clause regulation of an intrastate activity that is not economic in nature, such as the "taking" of a local species. *United States v. Morrison*, 529 U.S. 598, 611 (2000). To the contrary, the Court has invalidated such regulation in the form of a law authorizing civil damages for gender-motivated crimes (*id.*) and a law prohibiting the possession of a gun within 1,000 feet of a school (*United States v. Lopez*, 514 U.S. 549 (1995)).

Approval, by the Court of Appeals for the District of Columbia Circuit, of the U.S. Fish and Wildlife Service's actions in this case appears to give the federal government authority to regulate nearly any activity, whether commercial or not, on virtually any property. While this result of the case is fairly clear, the rationale is not. The circuit court merely pointed to its earlier 2-1 decision in *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998), in which individual judges offered several rationales, but failed to agree on any. One thought is that the ESA, by controlling the transport of endangered species, represents a proper exercise of the Commerce Clause power over the "use of the channels of interstate commerce." Another is that loss of medical or economic benefits from a listed species could, in the aggregate, have a substantial effect on interstate commerce, and thus implicate the Commerce Clause power. Yet another is that protection of biodiversity is important to the conservation of our ecosystem on which interstate commerce is dependent.

Because the result below conflicts with the decisions of this Court explaining the limits of the Commerce Clause power, and because the confusion engendered by the diverging rationales offered in *National*

Association of Home Builders calls for coherent resolution of the issue, this Court should take up this important case and clarify the limits of the Commerce Clause power as exercised through the ESA.

At its core, this case also concerns the authority of the federal government to regulate in areas traditionally left to the control of the states. In this respect, it presents the same issue discussed but left unresolved in *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159 (2001): Whether the federal power to regulate commerce among the states extends to regulation of species or activities that are entirely intrastate and noneconomic in nature.

Also important and warranting the Court's attention here is the Service's failure to make public, and hear comments on, an important study upon which the Service "placed great weight" in making its decision to list the fairy shrimp. In doing so, the Service stripped Petitioner and other interested parties of the right, under the Administrative Procedure Act ("APA"), to provide complete comments during the rule making process, and deprived itself of important information and analysis. Such action by the agency is entirely inconsistent with the mandate of the APA and unfairly precludes public participation on issues of immense significance.

This Court should accept the petition for certiorari in order to clarify the limits of federal authority under the Commerce Clause, and to articulate the role the public can expect to play in the decision-making process under the APA.

Argument

I. THIS CASE WARRANTS U.S. SUPREME COURT REVIEW TO ADDRESS THE IMPORTANT QUESTION WHETHER APPLICATION OF THE ESA TO INTRASTATE, NONECONOMIC SPECIES AND ACTIVITIES EXCEEDS THE LIMITS OF THE FEDERAL INTERSTATE COMMERCE POWER

A. BEDROCK CONSTITUTIONAL PRINCIPLES ARE AT STAKE HERE

The U.S. Constitution withholds from the federal government an unlimited license to regulate and rather grants the government certain enumerated powers. Unlike the several states, the federal government does not possess a general police power. Federalism and the enumeration of federal powers were principles "adopted by the Framers to ensure the protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (citations and internal quotation marks omitted).

In keeping with these principles, the Commerce Clause was carefully crafted to specifically facilitate the development of a common market among the states through the eradication of internal trade barriers. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.)1, 194-95 (1824). "[T]he enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description." *Id. quoted in United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000).

The drafters of the U.S. Constitution strove to establish a unified national economy through the elimination of discriminatory regulation by one state

against another, not to strip the states of their power to engage in self-government. Accordingly, the scope of the commerce power must have limits. If the federal power to regulate interstate commerce is to be limited to its stated ends, "the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate." *Morrison*, 529 U.S. at 618 n.8. More specifically, it cannot reach matters that are not commerce, or commerce that is not interstate.

This Court has made clear that "[t]he Constitution requires a distinction between what is truly national and what is truly local." *Id.* at 617-18 (citing *United States v. Lopez*, 514 U.S. 549, 568 (1995)). In *Lopez*, this Court noted that judicial deference to congressional regulation of single-state noncommercial activities would result in Congress being able to turn the commerce power into a national police power. *Lopez*, 514 U.S. at 565-67. A government that can regulate virtually anything and everything is not a limited government. Although there are no "bright and clear lines," the extent to which the area of regulation is the province of the states must be considered, as well as the extent to which the regulated activity is connected to commercial concerns. *Id.* at 579 (Kennedy, J., concurring). When the intrusion on state sovereignty is significant, and the purported commercial nexus is not, the statute in question will overstep the bounds of the Commerce Clause. See *Id.* at 564.

Regulation of land use and zoning "is perhaps the quintessential state activity," and has been "traditionally performed by local governments," *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994). *See also Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 402 (1979) ("The regulation of land use is

traditionally a function performed by local governments."). Intrusion on state sovereignty requires a "stronger connection" with commercial concerns central to the Commerce Clause, or the intrusion "contradicts the federal balance the Framers designed." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). In the absence of a substantial link to interstate commerce, this intrusion into state land use regulation, and subsequent confusion regarding overlapping regulation, cannot be justified under the limits of the Commerce Clause.

B. THERE IS NO NEXUS BETWEEN THE FAIRY SHRIMP, WHICH ARE THE SUBJECT OF THE GOVERNMENT'S LISTING DECISION, AND INTERSTATE COMMERCE

This case concerns the assertion of jurisdiction, under the Commerce Clause, by the U.S. Fish and Wildlife Service ("USFWS"), which has been charged with administering the ESA. In this role, the USFWS, acting pursuant to the direction of the Secretary of Interior, is granted jurisdiction to determine that a species is endangered or threatened and to designate the critical habitat of such species. 16 U.S.C. § 1533(a)(3) (2000). But that jurisdiction cannot exceed the limits of the Commerce Clause, and, accordingly, it must be shown to concern actual interstate commerce in order to pass constitutional scrutiny.

The USFWS's listing of the fairy shrimp cannot withstand such scrutiny. Upon listing, the fairy shrimp automatically were accorded various protections under the ESA, including protection against unauthorized "taking" by any person. Like the possession of guns in *Lopez*, the "taking" of fairy shrimp has nothing to do with "commerce" or any other economic activity. Indeed, the

possession or taking of fairy shrimp, which are not bought or sold on the open market, has less of a connection to "commerce" than the possession of a gun, an indisputably commercial item. Here, as in *Lopez*, Congress's Commerce Clause authority should not be turned into "a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567.

In rejecting this argument, the district court based its conclusion on Ninth Circuit cases involving the Eagle Protection Act and the Migratory Bird Treaty Act. However, unlike the eagles or migratory birds discussed in those Ninth Circuit decisions, there is little likelihood of interstate commerce in the fairy shrimp or of "'interstate movement of persons . . . who come to a state to study and observe these species.'" *Building Indus. Ass'n of Superior Cal. V. Babbitt*, 979 F. Supp. 893, 907 (D.D.C. 1997) (quoting *Palila v. Haw. Dep't of Land & Natural Res.*, 471 F. Supp. 985, 994-95 (D.Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981)).

As this Court has explained, the proper purview of the Commerce Clause is activity that is economic in nature and that substantially affects interstate commerce. In those cases in which the Court has "sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." *Morrison*, 529 U.S. at 611. Every law enacted by Congress must be based on a power enumerated in the Constitution. *Id.* at 607. Respondents justify the present statute as an act to regulate interstate commerce. But "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Id.* at 614 (quoting *Lopez*, 514 U.S. at 557 n.2) (citation and internal quotation marks omitted). "There is undoubtedly

an internal commerce which is subject to the control of the States." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 564 (1870). As Chief Justice Marshall observed in *Gibbons*, 22 U.S. (9 Wheat.) at 189, 196, "[c]ommerce . . . is intercourse," and the "power to regulate" means "to prescribe the rule by which commerce is to be governed." In other words, commerce entails the deliberate and purposeful interaction of goods and people in trade, navigation, communication, and movement. *See Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 326 (1851) (Daniel, J., concurring) ("The power delegated to congress by the constitution relates properly to the terms on which commercial engagements may be prosecuted; the character of the articles which they may embrace; the permission or terms according to which they may be introduced[.]").

In distinguishing truly national from truly local activities, the Court is aware that "[s]ome activities may be so private or local in nature that they simply may not be *in* commerce. Nor is it sufficient that the person or activity reached have *some* nexus with interstate commerce." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 310 (1981) (emphasis in original). The district court dismissed this reasoning, stating instead that "species preservation substantially affects the national economic interest." *Building Indus. Ass'n*, 979 F. Supp. at 907. However, Congress cannot regulate noneconomic activities simply because the activity, when aggregated, may have a substantial effect on commerce. *Morrison*, 529 U.S. at 610-11. The "substantial effects" tests of *Lopez* and *Morrison* forbid the consideration of potential cumulative economic impacts of regulation of noncommercial activity in order to establish authority under the Commerce Clause. To do so would require courts to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a

general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567.

Since the circuit court did not discuss the merits of Petitioner's Commerce Clause argument, it is uncertain on what basis the circuit court would conclude that the fairy shrimp are linked to interstate commerce. Although the circuit court pointed to the split-panel decision in *National Association of Home Builders*, 130 F.3d 1041, that decision provides no clear rationale for rejecting Petitioner's argument. In *National Association of Home Builders*, Judge Henderson and Judge Wald offered widely different opinions why the ESA was a proper exercise of Congress's Commerce Clause power. Judge Wald stated that the ESA properly controlled the channels of interstate commerce and regulated a class of activities that substantially affects interstate commerce. In contrast, Judge Henderson expressly rejected Judge Wald's arguments, and concluded instead that the loss of biodiversity itself has a substantial effect on the ecosystem and, therefore, on interstate commerce.

Not only does this split-panel decision leave open the question of the limits of the Commerce Clause in the District of Columbia Circuit and how those limits may be discerned, it also conflicts with this Court's decisions in *Lopez* and *Morrison*. Under *Lopez* and *Morrison*, it is the economic nature of the class of regulated activity itself, and not some measurable economic repercussion from the unconstitutional regulation, that must provide the basis for regulation under the Commerce Clause. In the absence of a showing that the fairy shrimp substantially affect interstate commerce, the use of the Commerce Clause to justify the ESA is both unwarranted and unconstitutional.

C. The Listing of the Fairy Shrimp Interferes with State and Local Sovereignty over Land Use Decisions

This case also presents the issue left unresolved in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC"): whether the federal power to regulate species or related activities that are entirely intrastate and noneconomic in nature invades the land use regulatory authority of state and local agencies. Although *SWANCC* concerned the use of the Clean Water Act, rather than the ESA, to regulate habitat, the U.S. Army Corps of Engineers' ("Corps") application of a federal regulation to control use and development of land raised many of the same concerns presented here regarding the usurpation of state and local governments' authority over local land use.

In *SWANCC*, the government asserted that because the land at issue served as a habitat for migratory birds, the Corps had the authority to prohibit SWANCC from developing the property as a landfill. Noting that the ponds in question were "seasonal [and] wholly located within two Illinois counties," this Court rejected the Corps' assertion that it could regulate SWANCC's use of its property under the Clean Water Act. *Id.* at 171-72. Noting that the Corps' assertion raised serious constitutional concerns, the Court based its holding on a determination that the language of the Clean Water Act did not provide for the regulation of these isolated ponds, leaving unresolved the question of "whether Congress could exercise such authority consistent with the Commerce Clause." *Id.* at 162.

The issue in this case cannot be resolved under the language of the federal regulation at issue, but instead must involve an examination of Congress's power under the

Commerce Clause. Development of land is an area traditionally reserved for the states by the Tenth Amendment. The Court has also deemed "zoning laws" and land use controls to be "peculiarly within the province of state and local legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975). In fact, the Court has previously noted that "regulation of land use is perhaps the quintessential state activity." *FERC*, 456 U.S. at 767 n.30. States, not federal agencies, are regarded as the proper governing bodies to enact and enforce laws concerning land use planning. *See Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as decision in *Village of Euclid, Ohio v. Amber Realty Co.*, 272 U.S. 365 (1926)). Here, as in the recent decision in *Jones v. United States*, 529 U.S. 848, 857 (2000), if the Court were to allow the unconstitutional enforcement of the ESA, then "hardly a [parcel of] land would fall outside the federal statute's domain."

The Court should review this case in order to address the constitutional issue left unresolved in *SWANCC*. The federal regulation at issue here intrudes into an area of government traditionally left to state and local control, and places countless building projects under federal jurisdiction without a showing that preservation of the fairy shrimp affects the national economic interest. State and local planning measures run the risk of being undermined by conflicting federal regulations. Consequently, the federal displacement of local control at issue here not only usurps state and local authority, but unnecessarily delays building projects and wastes millions of dollars.

In the proceedings below, Petitioner provided evidence that the listing of the fairy shrimp has depressed land values and development prospects, has halted or impeded specific construction projects, and has cost thousands of dollars in sampling surveys as well as the costs of delay. *Building Indus. Ass'n*, 979 F. Supp. 893. The Commerce Clause does not justify congressional use of "a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968) (Harlan, J.); *Gibbs v. Babbitt*, 214 F.3d 483, 491 (4th Cir. 2000) ("[W]here a federal statute has only a tenuous connection to commerce and infringes on areas of traditional state concern, the courts should not hesitate to exercise their constitutional obligation to hold that the statute exceeds an enumerated federal power."). By reviewing this case, the Court can resolve these important constitutional concerns in the critical context of the ESA's sweep over local land use regulation.

II. THIS CASE WARRANTS U.S. SUPREME COURT REVIEW TO ADDRESS THE IMPORTANT QUESTION WHETHER THE ADMINISTRATIVE PROCEDURE ACT REQUIRES THE AGENCY TO MAKE AVAILABLE TO THE PUBLIC ALL SCIENTIFIC STUDIES IT RELIES UPON IN MAKING ITS DECISION

In determining whether a species should be listed under the ESA, the USFWS must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b)-(c) (2000) (App. D-1) (incorporated into ESA by reference at 16 U.S.C. § 1533(b)(4) (2000) (App. E-6). This requirement ensures that relevant information is brought to the USFWS's attention and that its decision is an informed and intelligent one. In contrast, a scheme that

limits or sidesteps widespread public participation will most likely fail to address all relevant concerns.

Public participation in an agency's rule making process is important for two reasons. First, the combined expertise of the agency and the public produces better rules, since public input leaves the agency better informed and may offset any institutional bias for or against a particular rule. Second, the procedure guarantees an open process by enabling interested parties to express their views to agency officials who are not directly accountable to the voters. In *Guardian Federal Savings & Loan Ass'n v. Federal Savings & Loan Insurance Corp.*, 589 F.2d 658, 662 (D.C. Cir. 1978), the District of Columbia Circuit succinctly set forth the benefits of notice and comment to rule making:

> This public participation assures that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions. Public rule making procedures increase the likelihood of administrative responsiveness to the needs and concerns of those affected. And the procedure for public participation tends to promote acquiescence in the result even when objections remain as to substance.

Here, the USFWS violated the APA by relying on a scientific study obtained after the close of the comment period without giving interested parties an opportunity to comment on the study. More specifically, the USFWS did not give sufficient public notice of, and opportunity for, comment on either its methodology or the scientific report, the Simovich study, on which it primarily relied.

Both courts below acknowledged the critical role that the Simovich study played in the agency's decisionmaking process, yet neither court found that the agency was required, under the APA, to make this important study available for public comment. The district court conceded that "[b]ecause the Final Rule relies heavily, although not exclusively, on the Simovich study for the important proposition that fairy shrimp are rare within their ranges, the study should have been made available for notice and comment." *Building Indust. Ass'n*, 979 F. Supp. 893, 902-03. Similarly, the circuit court observed that the Simovich study was "the best available study." *Building Indust. Ass'n*, 247 F.3d 1241, 1246. The circuit court acknowledged that, under the APA, an agency is obligated to publish for comment the technical studies and data on which it relies, but concluded nonetheless that the USFWS was not required to make the Simovich study available for comment because it "only confirmed the findings delineated in the proposal.". *Building Indust. Ass'n of Superior Cal. v. Babbitt*, 247 F.3d 1241, 1245-46. As the circuit court put it, "a final rule that is a logical outgrowth of the proposal does not require an additional round of notice and comment even if the final rule relies on data submitted during the comment period...In relying on it, the Service 'did no more than provide support for the same decision it had proposed to take.'" *Id.* (*citing Int'l Fabric Inst. v. EPA*, 297 U.S. App. D.C. 331, 972 F. 2d 384, 399 (D.C. Cir. 1992) (per curiam)).

The circuit court's conclusion and reasoning undercuts the APA's publication provision, the whole purpose of which is to allow the public to submit comments both in support of and in opposition to the proposal. Publication also allows the public to suggest alternative solutions to an agency's proposed rule. *See Guardian Federal*, 589 F. 2d at 662. A study that supports the

proposal is as critical an element as the proposal itself, and requires the same opportunity for public discussion and examination. Anything less precludes the public's opportunity to critically examine the proposal or to provide alternatives.

The listing of the fairy shrimp is a highly controversial topic. It makes little sense that the USFWS could rely so heavily on the study, the "best available study," but not allow the public to see it or comment on it. The USFWS's failure to publish the Simovich study, and the lower courts' endorsement of the agency's inaction, strips the public of its right to fully weigh in on a highly contentious decision and violates the public participation provisions of the APA. The clear "purpose of the notice and comment requirement is to provide for meaningful public participation in the rule-making process." *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995). The necessity for notice and opportunity to comment is greatly heightened when an agency relies on a single study to support its final rule. *See id.*

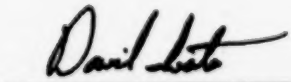
As this Court is well aware, notice and comment procedures are designed to overcome the problems associated with uninformed rule making. Participation by economic and community-based groups "in the rule making process is essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests." *Report of the Attorney General's Comm'n on Administrative Procedure in Government Agencies* 101-02, 103 (Washington, D.C. 1941). Furthermore, the "[o]pportunity for public comment is particularly crucial when the accuracy of important material in the record is in question." *Idaho Farm Bureau Federation*, 58 F.3d at 1403.

A decision that permits rule making without full public review of the record upon which the rule is promulgated prevents meaningful public participation in the rule making process. Furthermore, such an interpretation allows questionable data to result in the listing of a species as endangered or threatened. The listing of the fairy shrimp has enormous repercussions for homebuilders and those members of the community interested in economic growth. Despite this enormous impact on their livelihood, members of CELSOC and the Building Industry Association, as well as members of the general community, have effectively been prevented by the USFWS's actions from fully weighing in on an important decision, the effects of which will be felt throughout the community. Such a result most surely conflicts with the informed decision making process that the APA is designed to ensure. This case warrants U.S. Supreme Court review to clarify and confirm the open rule making process to be expected of federal agencies.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari in this case.

Respectfully submitted,



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